STATE OF MICHIGAN

COURT OF APPEALS

RANDIE K. GRIER,

Plaintiff-Appellant,

and

ANGELA ISBY,

Plaintiff,

v

SUNSHINE AUTO COLLISION, INC., a/k/a SUNSHINE AUTO COLLISION CORP., a/k/a SUNSHINE AUTO COLLISION COMPANY, and HASSAN GHAZALI,

Defendants-Appellees,

and

KAREN ANDERSON, JUNE L. FOSTER, and CURTIS THURSTON,

Defendants.

UNPUBLISHED
March 30, 2010

No. 287877
Wayne Circuit Court
LC No. 05-515942-CH

Before: Hoekstra, P.J., and Stephens, and M.J. Kelly, JJ.

PER CURIAM.

In this property dispute, plaintiff appeals as of right an order dismissing his case as a result of discovery violations. We affirm.

First, plaintiff argues that Wayne Circuit Court Chief Judge William J. Giovan erred by not disqualifying Judge Isidore B. Torres pursuant to MCR 2.003 because Judge Torres had a predisposed bias toward plaintiff, as exhibited by his refusal to allow plaintiff to participate in an in-chambers meeting. We disagree. In reviewing a motion to disqualify a judge, the trial court's findings of fact are reviewed for an abuse of discretion and trial court's application of those facts to the relevant law is reviewed de novo. *In re Contempt of Henry*, 282 Mich App 656, 679; 765 NW2d 44 (2009).

MCR 2.003(B)(1) provides that "a judge is disqualified when the judge cannot impartially hear a case" including when a "judge is personally biased or prejudiced for or against a party or attorney[.]" A party who challenges a judge for personal bias or prejudice must overcome a heavy presumption of judicial impartiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996).

In general, the challenger must prove that the judge harbors actual bias in favor of or prejudice against either a party or a party's attorney that is both personal and extrajudicial. *Van Buren Twp v Garter Belt, Inc*, 258 Mich App 594, 598; 673 NW2d 111 (2003). Bias or prejudice has been defined as "an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair-minded person could not entirely set aside when judging certain persons or causes." *Cain*, 451 Mich at 495, n 29, quoting *United States v Conforte*, 624 F2d 869, 881 (CA 9, 1980). The opinions formed by a judge based on facts introduced or events that occurred during the proceedings do not constitute bias or prejudice unless the judge exhibits deep-seated favoritism or antagonism that makes the exercise of fair judgment impossible. *Cain*, 451 Mich at 496.

Although plaintiff raised additional grounds for disqualification before the Chief Judge of the trial court, his sole argument on appeal is that disqualification was necessary because Judge Torres excluded him from an in-chambers meeting and is biased against him because of his status as a pro se litigant. The Chief Judge of the trial court found both that there was insufficient proof of plaintiff being excluded from any pre-trial chambers conference and that at the time of the alleged exclusion the plaintiff's interest in the litigation was questionable. In addition, the Chief Judge of the trial court found that there was no evidence that Judge Torres had a policy of excluding pro se litigants from in-chambers meetings. Although plaintiff points to the testimony of defendants' former attorney, who indicated that there was an in-chambers meeting in which plaintiff did not participate, the circumstances for plaintiff's non-participation were not divulged. Excluding a pro se litigant from an in-chambers meeting would have been a mistake if it had occurred; however, mistakes during proceedings are generally not grounds for disqualification. See *Gates v Gates*, 256 Mich App 420, 440; 664 NW2d 231 (2003) (noting that judicial rulings almost never constitute a valid basis for a motion alleging bias). Even considering the possible exclusion of plaintiff from an in-chambers meeting, plaintiff cites no facts showing that Judge Torres harbors actual bias or prejudice against plaintiff. As a result, Chief Judge Giovan properly denied plaintiff's motion.

Plaintiff also argues that the trial court's denial of his motion to disqualify Judge Torres denied him his due process right to a fair trial. A judge may be disqualified without a showing of actual bias "where experience teaches us that the probability of actual bias . . . is too high to be constitutionally tolerable." *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975) (internal quotations and citations omitted); see also *Kloian v Schwartz*, 272 Mich App 232, 244; 725 NW2d 671 (2006). Among the situations presenting such a risk are: (1) where the trial judge "has a pecuniary interest in the outcome," (2) where the judge "has been the target of personal abuse or criticism from the party before him," (3) where the judge is "enmeshed in [other] matters involving petitioner," and (4) where the judge may have "prejudged the case because of prior participation." *Crampton*, 395 Mich at 351; *Kloian*, 272 Mich App at 244-245. However, "disqualification for bias or prejudice is only constitutionally required in the most extreme cases." *Cain*, 451 Mich at 498.

Plaintiff argues that his exclusion from an in-chambers meeting must be interpreted as a situation where the probability of actual bias is too high to be constitutionally tolerable. As noted, the circumstances surrounding plaintiff's alleged exclusion are not clear and plaintiff cites no facts showing a bias on the part of Judge Torres, let alone a bias severe enough to rise to the level of violating plaintiff's due process rights. Therefore, because of the scarcity of any evidence supporting the probability of an actual bias, plaintiff's argument must fail.

Plaintiff also argues that the trial court abused its discretion by dismissing his case as a sanction for the violation of discovery orders because the record is silent regarding what discovery was being sought, whether plaintiff's alleged failure was accidental or involuntary, and what prejudice defendants suffered. Further, plaintiff contends that his conduct and any prejudice suffered by defendants did not warrant dismissal. We disagree.

A trial court's decision on whether to impose discovery sanctions is reviewed for an abuse of discretion. *Local Area Watch v Grand Rapids*, 262 Mich App 136, 147; 683 NW2d 745 (2004). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

If a party fails to obey a discovery order, MCR 2.313(B)(2)(c) permits the court to enter "an order striking pleadings or parts of pleadings, staying further proceedings until the order is obeyed, dismissing the action or proceeding or a part of it, or rendering a judgment by default against the disobedient party." Dismissal is the harshest sanction available and is warranted only in extreme cases. *Schell v Baker Furniture, Co*, 232 Mich App 470, 475; 591 NW2d 349 (1998), aff'd 461 Mich 502 (2000); *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 507; 536 NW2d 280 (1995). A court should employ the drastic sanction of dismissal only "where there has been a flagrant and wanton refusal to facilitate discovery, and where the failure has been conscious or intentional, rather than accidental or involuntary." *Frankenmuth Mutual Insurance Company v ACO, Inc*, 193 Mich App 389, 396-397; 484 NW2d 718 (1992). Further, sanctions under MCR 2.313(B) may not be imposed in the absence of a discovery order. *Brenner v Kolk*, 226 Mich App 149, 158-159, 573 NW2d 65 (1997).

In *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999), overruled on other grds *Dimmitt & Owens Financial, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618; 752 NW2d 37 (2008), this Court stated:

> The trial court should carefully consider the circumstances of the case to determine whether a drastic sanction such as dismissing a claim is appropriate. Severe sanctions are generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery, not when the failure to comply with a discovery request is accidental or involuntary. The record should reflect that the trial court gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it. [Citations omitted.]

The *Bass* Court cited the following factors to be considered in determining the appropriate sanction for a discovery violation:

> "(1) [W]hether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the [other party]; (4) actual notice to the [other party] of the witness and the length of time prior to trial that the [other party] received such actual notice; (5) whether there exists a history of [the party's] engaging in deliberate delay; (6) the degree of compliance by the [party] with other provisions of the court's order; (7) an attempt by the [party] to timely cure the defect[;] and (8) whether a lesser sanction would better serve the interests of justice." [*Bass*, 238 Mich App at 26-27, quoting *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).]

The record supports a finding that there was a repeated failure on the part of plaintiff to provide discovery and obey the trial court's orders. The trial court issued discovery orders on two separate occasions, ordering plaintiff to produce previously requested documents and to fully and completely answer interrogatories. The first order was issued on May 30, 2008, and the second on July 21, 2008. Both orders referenced the same discovery materials. No motions for reconsideration or clarification were filed with the court. In correspondence between the parties, plaintiff claimed confusion about what was requested of him and defendant reiterated that his discovery requests were mailed to the court. After plaintiff's disregard of the first order, the trial court sanctioned plaintiff $1,150 as part of the second order. When plaintiff neither provided the discovery nor paid the sanction, the trial court determined that the sanction of dismissal was proper because plaintiff had flagrantly and willfully violated its orders to defendant's detriment. The trial court received argument from the parties and reviewed the file. His order reflected his finding that plaintiff was in receipt of the discovery requests and had completely failed to provide any of the requested documents relating to his acquisition of the subject property. Credibility is generally a finding that we leave to the fact-finder. *Dep't of Community Health v Risch*, 274 Mich App 365, 372; 733 NW2d 403 (2007). Since plaintiff claims an interest in land acquired by written instruments two months after the case was filed by Ms. Isby, the requested documents are of great relevance. The trial court explicitly found that defendants had been prejudiced in their ability to defend the matter. The trial judge found that the failure to comply with the court orders was knowing and that given an opportunity to cure his failure, he deliberately chose to delay and continue his non-compliance.

In total, the record reflects that the trial court gave careful consideration to the factors involved and considered all its options in deciding to dismiss the case. Therefore, based on the foregoing, we conclude that the trial court's decision to sanction to plaintiff by dismissing the case was not an abuse of discretion.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly